IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

JOYCE ALLEN
Plaintiff

V. NO. 1:95CV20-B-D

NPC INTERNATIONAL, INC. d/b/a PIZZA HUT; GATES, McDONALD & COMPANY; NATIONWIDE INSURANCE COMPANY; JOEL GRAFFAGNINI; MIKE CURTISS; and JULIE KACH
Defendants

MEMORANDUM OPINION

This cause comes before the court upon the defendants' motion for summary judgment.[1] The court has duly considered the parties' memoranda and exhibits and is ready to rule.

FACTS

The defendant, NPC International, Inc. (hereinafter "NPC") operates two Pizza Hut restaurants in Starkville, Mississippi. The plaintiff, a black female, was employed by one of those restaurants as an assistant manager in August of 1993. Throughout the course of the plaintiff's employment, the defendant Graffagnini was the manager of the restaurant in which the plaintiff was employed, and the defendant Curtiss was an area general manager whose

[1] The defendants NPC International, Inc., Joel Graffagnini, and Mike Curtiss have jointly filed three motions--a motion to dismiss, a motion for partial summary judgment, and a motion for summary judgment. Since the parties have submitted evidence beyond the pleadings, the court will treat all three as a motion for summary judgment, pursuant to Rule 12(b).

responsibilities included supervision of the plaintiff's restaurant.

In January of 1994, the plaintiff took an indefinite leave of absence due to a gall bladder problem that was ailing her at the time. In mid-March of 1994, the plaintiff presented two separate return to work releases, one of which stated that she was pregnant. Upon her return to work in April of 1994, Graffagnini instructed the plaintiff to spend a few days concentrating on pizza preparation, ostensibly to brush up on her skills and to learn the new techniques that Pizza Hut had instituted during her absence. According to the plaintiff, such extensive pizza preparation was unusual for an assistant manager. A few days after her return, the plaintiff was officially demoted to the position of shift-leader/cook. In being demoted, the plaintiff went from a salaried position to an hourly position. On May 29, 1994, the plaintiff was terminated.

The plaintiff has filed numerous causes of action in regards to her demotion and termination, including Title VII claims for race and gender based discrimination. The plaintiff claims that she was told by Graffagnini that she was being demoted because of her pregnancy, and further, that after her discharge she saw a written statement from the defendants which stated that she had been terminated because of her pregnancy. The plaintiff has also submitted the deposition testimony of James Collins, one of the

assistant managers, who stated that Graffagnini told him the plaintiff was being demoted because of her pregnancy.

Pizza Hut generally operates its restaurants with two assistant managers. In March of 1994, with the plaintiff still on a medical leave of absence for her gall bladder, Pizza Hut hired the defendant Julie Kach as a "temporary" assistant manager. Kach is a white female. Although the defendant claims Kach was hired on a temporary basis, there is no evidence as to the duration of Kach's employment, and it is undisputed that Kach remained assistant manager throughout the remainder of the plaintiff's employment.

LAW

On a motion for summary judgment, the movant has the initial burden of showing the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 275 (1986) ("the burden on the moving party may be discharged by 'showing'...that there is an absence of evidence to support the non-moving party's case"). Under Rule 56(e) of the Federal Rules of Civil Procedure, the burden shifts to the non-movant to "go beyond the pleadings and by...affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Celotex Corp., 477 U.S. at 324, 91 L. Ed. 2d at 274. That burden is not discharged by "mere allegations or denials." Fed. R. Civ.

P. 56(e). All legitimate factual inferences must be made in favor of the non-movant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 91 L. Ed. 2d 202, 216 (1986). Rule 56(c) mandates the entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp., 477 U.S. at 322, 91 L. Ed. 2d at 273. Before finding that no genuine issue for trial exists, the court must first be satisfied that no reasonable trier of fact could find for the non-movant. Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 552 (1986).

The plaintiff has filed the following causes of action: Title VII claims for race and gender based discrimination as well as general harassment[2]; wrongful termination; defamation; intentional infliction of emotional distress; and negligent infliction of emotional distress. By a stipulation of dismissal filed on June 3, 1996, the plaintiff withdrew additional claims for conspiracy, violation of the Mississippi Constitution, and tortious interference with unemployment benefits.

A. Individual Liability Under Title VII

The defendants move for summary judgment on the issue of the individual liability of Graffagnini and Curtiss under Title VII.

[2] The plaintiff's complaint seeks damages for "harassment, intimidation, and threats" which the court will refer to as "general harassment" for simplicity.

The Fifth Circuit has steadfastly held that liability under Title VII does not attach to persons acting in their individual capacity. Grant v. Lone Star Co., 21 F.3d 649, 652-653 (5th Cir. 1994), cert. denied, --- U.S. ---, 130 L. Ed. 2d 491 (1994); see also Garcia v. Elf Atochem North Am., 28 F.3d 446, 451 n.2 (5th Cir. 1994). The Civil Rights Act of 1991 amended Title VII so as to create additional remedies for plaintiffs seeking relief under Title VII, most notably the right to recover compensatory and punitive damages. However, despite the augmented means of recovery created by the Civil Rights Act of 1991, the amendments to the statute do nothing to create individual liability. See Zatarain v. WDSU-Television, Inc., 881 F. Supp. 240, 244-245 (E.D. La. 1995), aff'd, 79 F.3d 1143 (5th Cir. 1996) (analysis provided in Grant regarding individual liability under Title VII survives the 1991 amendments); Ajaz v. Continental Airlines, 156 F.R.D. 145, 148 (S.D. Tex. 1994) (no indication in Title VII, as amended by Civil Rights Act of 1991, that Congress intended to impose liability upon individual employees in cases of employment discrimination). Therefore, the court finds that the plaintiff cannot maintain a cause of action against either Graffagnini or Curtiss in their individual capacity for claims arising under Title VII.

B. NPC Liability Under Title VII

The defendants argue that any claims the plaintiff makes regarding racial discrimination, general harassment, or any Title

VII claim arising out of her discharge should be dismissed because they were not included in a timely filed charge with the EEOC. The defendants assert that the plaintiff's initial EEOC charge was for sexual discrimination in her demotion. The plaintiff subsequently filed an amended, but unsigned, EEOC charge alleging sexual discrimination in her discharge. The defendants claim that this amended charge was never served upon them. However, documents from the EEOC file indicate that the defendants were notified of the amended charge, and that the defendants responded to allegations arising out of both the plaintiff's demotion and discharge. Further documents from the EEOC file indicate that the plaintiff attempted to raise charges of racial discrimination and general harassment, but somehow the allegations failed to appear in the official charges. Nevertheless, the court will not dismiss any of the plaintiff's Title VII claims on the grounds that they were not timely filed with the EEOC. The purpose of filing charges with the EEOC is to instigate an investigation. Sanchez v. Standard Brands, Inc., 431 F.2d 455, 466 (5th Cir. 1970). Technical omissions of legal theories from an EEOC charge will not preclude a plaintiff from including such theories in a Title VII complaint, so long as the acts upon which the theories are based are noted in the charge. Matthews v. A-1, Inc., 748 F.2d 975, 977 (5th Cir. 1984). See also Ray v. Freeman, 626 F.2d 439, 443 (5th Cir. 1980), cert. denied, 450 U.S. 997, 68 L. Ed. 2d 198 (1981) (court will entertain cause

of action as long as allegations in complaint are reasonably related to EEOC charges); Sanchez, 431 F.2d at 465 (procedural technicalities are not to stand in the way of Title VII complainants).

The defendants assert that the plaintiff's claims for general harassment should be dismissed since the plaintiff has failed to allege any unlawful basis for the harassment. Even if the court assumes race and gender as the unlawful basis, the plaintiff has failed to produce any evidence to support her general harassment claim. To proceed with a claim for race or gender harassment, the plaintiff must present evidence of slurs or derogatory remarks directed at race or gender which are so pervasive as to create an abusive work environment. Harris v. Forklift Sys., Inc., 510 U.S. ___, 126 L. Ed. 2d 295, 301-302 (1993); Hamilton v. Rodgers, 791 F.2d 439, 441-442 (5th Cir. 1986). The plaintiff has testified that she was not subjected to any derogatory remarks based upon race or gender. Therefore, the court finds that the plaintiff's claims for harassment, intimidation, and threats should be dismissed.[3]

[3] Sexual harassment, perhaps the most common form of general workplace harassment, has not been alleged by the plaintiff, and the plaintiff has specifically denied that she was subjected to any sexually suggestive comments.

To present a prima facie case of race or gender[4] based discrimination under Title VII, the plaintiff may show: (1) that she was a member of a protected class; (2) that she was qualified for the position held; (3) that she was subject to an adverse employment decision; and (4) that she was replaced by someone outside of the subject classification. Meinecke v. H&R Block, 66 F.3d 77, 83 (5th Cir. 1995); Marks v. Prattco, Inc., 607 F.2d 1153, 1155 (5th Cir. 1979). A plaintiff may always present a prima facie case by offering direct evidence of discrimination, in which case the four-part test developed for circumstantial evidence is unnecessary. Lee v. Russell County Bd. of Educ., 684 F.2d 769, 774 (5th Cir. 1982).

After reviewing the evidence submitted by the parties, the court has serious doubts concerning the viability of the plaintiff's case. However, at this stage of the proceedings, the court must resolve all doubts and draw all reasonable inferences in favor of the non-moving party. See Thomas v. LTV Corp., 39 F.3d 611, 616 (5th Cir. 1994). Although much of the plaintiff's evidence is suspect, she has provided the minimal amount necessary

[4] Title VII declares it an unlawful employment practice for an employer to discriminate against any individual with respect to his or her employment, "because of such individual's...sex." 42 U.S.C. § 2000e-2(a)(1). In 1978, the Pregnancy Discrimination Act added section (k) to the definition section of Title VII. Section (k) states that the term "because of sex" includes "because of or on the basis of pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e(k).

to escape summary judgment at this time. The plaintiff has offered testimony to the effect that she was demoted and/or discharged due to her pregnancy, and has further offered evidence that she was replaced by someone outside of her racial classification. Therefore, the court finds that there are genuine issues of material fact as to the plaintiff's Title VII claims for race and gender based discrimination, including, but not limited to, whether the plaintiff was demoted and/or discharged because of her race, gender, or pregnancy.

C. Wrongful Termination

The State of Mississippi has long adhered to the employment-at-will doctrine. Solomon v. Walgreen Co., 975 F.2d 1086, 1089 (5th Cir. 1992). In the absence of an employment contract, the discharged employee has traditionally had no cause of action for wrongful termination. Id. In 1993, the Mississippi Supreme Court created two exceptions to this long-standing rule. An employee may bring a cause of action for wrongful termination if he is fired for (1) refusing to commit an illegal act; or (2) reporting his employer's illegal act. McArn v. Allied Bruce-Terminix Co., 626 So. 2d 603, 607 (Miss. 1993). However, neither of these two exceptions applies to the present case.

The plaintiff asks the court to extend McArn and create a new exception commensurate with the facts of this case. The court is not inclined to do so. Creating exceptions to long-standing state

law is better left to the Supreme Court of Mississippi. The plaintiff further suggests that the employee handbook may have created certain employment rights for the benefit of the plaintiff. However, the plaintiff has failed to identify any specific rights that were created by the handbook.

D. Defamation

The plaintiff's complaint asserts a cause of action for defamation based upon the defendants' statements to the Mississippi Employment Security Commission during the Commission's investigation into the plaintiff's eligibility for unemployment compensation benefits. However, any statements made to the Commission are privileged and cannot be the basis for a defamation action unless the statements are both false in fact and maliciously made for the purpose of causing a denial of benefits. Miss. Code Ann. § 71-5-31 (1972); McArn, 626 So. 2d at 608. The alleged statements concerned the plaintiff's tardiness and absenteeism during her scheduled shifts. Even if the plaintiff's general denial of her absenteeism is sufficient to raise a genuine issue as to the falsity of the defendant's statements, the plaintiff has presented no evidence that the statements were made with malicious intent. An employee's disagreement with the reason for her termination does not give rise to a cause of action for defamation upon the employer's conveyance of those reasons to the Commission. McArn, 626 So. 2d at 608.

The plaintiff's complaint vaguely asserts that defamatory statements were published to third parties by the defendants. However, the plaintiff has failed to specify what statements were made, when they were made, and to whom they were made. The only evidence the plaintiff has offered regarding defamatory statements allegedly made to someone other than the Commission concerns one instance in which the plaintiff received a written reprimand which Graffagnini allegedly left sitting exposed on a counter for the other employees to see. This "evidence" does not present a sufficient level of proof that anyone saw the written reprimand, or that the plaintiff was somehow damaged from the alleged defamation. Therefore, the court finds that the plaintiff's claims for defamation should be dismissed.

E. Intentional Infliction of Emotional Distress

An action for the intentional infliction of emotional distress arises where there is something about the defendant's conduct which evokes outrage or revulsion. Sears Roebuck & Co. v. Deavers, 405 So. 2d 898, 902 (Miss. 1981). Even conduct that rises to the level of nerve-wracking, upsetting, and improper is not enough to reach the level of extreme and outrageous conduct required for recovery for the intentional infliction of emotional distress. Jenkins v. City of Grenada, 813 F. Supp. 443, 447 (N.D. Miss. 1993). The plaintiff has produced no evidence of any conduct by the defendants

which could be deemed to be so outrageous as to support an award for the intentional infliction of emotional distress.

F. Negligent Infliction of Emotional Distress

The acts of which the defendants are accused are not negligent acts. A claim for negligent infliction of emotional distress does not arise from acts of intentional discrimination. Furthermore, any state tort claim grounded in negligence asserted by the plaintiff would be barred by the exclusive remedy provision of the Mississippi Workers' Compensation Law. Campbell v. Jackson Business Forms Co., 841 F. Supp. 772, 774-775 (S.D. Miss. 1994).

CONCLUSION

For the foregoing reasons, the court finds that the defendants' motion for summary judgment should be denied as to the plaintiff's Title VII claims for race and gender based discrimination in her demotion and discharge. The court further finds that the defendants' motion for summary judgment should be granted as to all other claims.

An order will issue accordingly.

THIS, the _____ day of June, 1996.

NEAL B. BIGGERS, JR.
UNITED STATES DISTRICT JUDGE